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Federal Grand Juries v. Attorney Independence and the Attorney-Client Privilege

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Over the past four years . . . we have witnessed the birth of a new breed of political animal—the kangaroo grand jury —spawned in a dark corner of the Department of Justice, nourished by an administration bent on twisting law enforcement to serve its own political ends, a dangerous modern form of star chamber secret inquisition that is trampling the rights of American citizens from coast to coast.[1]

Introduction

ON April 16, 1975, an attorney in New York received a call from an FBI agent; the agent asked for the address of one of the attorney's clients. Upon the attorney's refusal to furnish the address, the agent stated that in order to get the information, he would have the attorney subpoenaed before a federal grand jury. Eight days later the agent arrived at the lawyer's office with a subpoena issued by the assistant United States attorney commanding that the lawyer appear before a federal grand jury the following morning. In the suit that followed, the United States attorney told the court that the grand jury would ask the lawyer for the home and work addresses and phone numbers of the client.[2] The Center for Constitutional Rights and the National Lawyers Guild filed amicus briefs on behalf of the attorney. The district court quashed the subpoena on May 22.[3]

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1. *Hearings on Grand Jury before Subcomm. 1 of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 4 (1973) (testimony of Senator Edward M. Kennedy).

2. *See In re* Grand Jury Subpoena of Stolar, 397 F. Supp. 520 (S.D.N.Y. 1975).

3. *Id.* at 525.

While these events were taking place, the Court of Appeals for the Fifth Circuit was deciding a case in which a Texas district court had held five attorneys in contempt after they had been subpoenaed by the United States attorney to appear before a grand jury.[4] The attorneys had refused to answer questions concerning the names of people who had paid legal fees to them in connection with their representation of a client. The Association of Trial Lawyers of America filed an amicus brief on behalf of the attorneys. The Fifth Circuit reversed the contempt citations.[5]

Earlier in 1975, the Ninth Circuit upheld the finding of contempt against a Nevada attorney who had been subpoenaed before a federal grand jury and had refused to answer questions about his fee arrangement with a client.[6] An impressive array of attorney associations filed an amicus brief in the Supreme Court, urging reversal of the conviction,[7] but the Court denied certiorari.[8]

The use of the grand jury by federal prosecutors in the above situations jeopardizes the independence of the bar, presents a clear threat to the attorney-client privilege, and is part of a pattern that endangers the civil liberties of all American citizens. These strong words should not surprise anyone who has observed the Department of Justice's gross misuse of grand juries in recent years; nor should they shock anyone who is aware of recent attacks on lawyers by some sectors of the government.

The first section of this article traces the recent history of abuse of the grand jury. As noted in that section, the pattern of grand jury abuse by the Department of Justice began under Attorneys General John Mitchell[9] and Richard Kleindienst,[10] and under the specific direc-

4. *See* United States v. Jones, 517 F.2d 666 (5th Cir. 1975).

5. *Id.* at 675.

6. *In re* Grand Jury Appearance of Michaelson, 511 F.2d 882 (9th Cir. 1975), *cert. denied*, 421 U.S. 978 (1975).

7. The American Civil Liberties Union of Northern and Southern California, the California Attorneys for Criminal Justice, the Coalition to End Grand Jury Abuse, the California Public Defenders Association, the California Trial Lawyers Association, the Federal Defenders of San Diego, the National Association of Criminal Defense Lawyers, the National Lawyers Guild, the National Legal Aid and Defender Association, the San Diego County Bar Association, and the San Diego Criminal Defense Lawyers Club. *See* Brief for American Civil Liberties Union as Amicus Curiae.

8. Michaelson v. United States, 421 U.S. 978 (1975).

9. John Mitchell was convicted on January 1, 1975, of conspiracy to obstruct justice in connection with the Watergate conspiracy. N.Y. Times, Jan. 2, 1975, at 1, col. 8.

10. Richard Kleindienst pleaded guilty on May 16, 1974, to refusing to testify accurately before a Senate committee investigating the International Telephone & Telegraph (ITT) affair, in return for not being charged with perjury. S. F. Chronicle, May 17, 1974, at 1, col. 3.

tion of Assistant Attorney General Robert Mardian.[11] The Watergate scandal has revealed that the Department of Justice and the White House were involved in plans aimed at disruption and harassment of political opponents of the administration. One notable instance was the so-called Huston plan, which called for illegal methods of electronic surveillance, mail interception, and burglary directed against the political left.[12] It is of interest that at about the same time that these plans were developed, the Department of Justice began its grand jury campaign, discussed below, which was also directed largely against political opponents.

The first section of this article demonstrates that there has been what Senator Kennedy has termed a "twisting [of] law enforcement," and that this misuse of the grand jury continues. Following this discussion is a brief description of some recent instances in which prosecutors and others in government have made attacks on lawyers. The aim of this section is to show that we face a potentially troublesome time in which lawyers may be attacked for their politics, or merely for zealous defense of their clients and steadfastness in preserving client confidences.

It is the thesis of this article that when faced with a prosecutor who has subpoenaed an attorney in order to obtain information about a client, a court should give vigorous and forceful protection to the attorney-client privilege. It is only when the attorney-client privilege becomes a strong and impenetrable barrier that the independence of the bar under our adversary system of justice can be preserved. If prosecutors are allowed to use grand juries to subvert the privilege, the erosion of our civil liberties will have progressed one step further, and an institution once seen as the great protector of individual liberty will be that much closer to becoming a device for prosecutorial repression. Thus, the final section of this article examines some aspects of the law of attorney-client privilege which are under attack and which, it is argued, should not be subject to prosecutorial manipulation through abuse of the grand jury system.

The Grand Jury: From Noble Use to Prosecutorial Abuse

The grand jury is an institution dating back to 12th century

11. Robert Mardian, like Mitchell, was convicted on January 1, 1975, of conspiracy to obstruct justice. N.Y. Times, Jan. 2, 1975, at 1, col. 8.

12. *Id.*, July 22, 1973, § 6 (Magazine), at 10.

England.[13] Although much of its history has been romanticized, it is true that generally its high historical purpose was to act as a shield between the king's prosecutors and the people. Before a prosecutor could charge someone with a crime and bring him or her to trial, a grand jury had to pass on the prosecutor's evidence and determine whether there was good cause for such action. The grand jury was theoretically independent of the prosecutor and screened the government's case with a close eye to assess its soundness. If the grand jury found good cause, the person was indicted and brought to trial; if not, the case was dismissed. In addition to performing this screening function, the grand jury at times also conducted independent investigations into government wrongdoing.

The most famous grand jury actions were those in which grand juries refused to indict when the king, for political reasons, sought to have his enemies indicted.[14] Thus, the prevalent concept of the grand jury in early America was of a noble, independent institution which stood between both vindictive, politically motivated prosecutors and overly zealous or mistaken prosecutors and the people.[15] The writers of the Constitution were so impressed with this institution that they incorporated it into the Bill of Rights. The fifth amendment provides that no person can be tried by the federal government for a serious crime (a felony) unless first indicted by a grand jury.[16]

13. *See generally* 8 J. MOORE, FEDERAL PRACTICE ¶ 6.01-02 (2d ed. 1975); Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701 (1972); Friedman, *Grand Jury: Sword or Shield* (1972) (paper delivered to American Civil Liberties Union Conference of Committee for Public Justice, in New York City, 1972) [hereinafter cited as Friedman] (on file with the author at University of San Francisco School of Law).

14. One of the most famous instances was the grand jury's refusal in 1681 to indict the Earl of Shaftesbury. *See* Proceedings Against the Earl of Shaftesbury, 8 Cobbetts State Trials 759 (T. Howell ed. 1681); Friedman, *supra* note 13. In the United States in 1735, two grand juries refused to indict John Peter Zenger on charges of seditious libel. He was finally indicted by a third grand jury. *Id.* at 8.

15. There is no doubt that this general concept of the grand jury is highly idealized. Grand juries were in fact used politically by the king and by governments in this country. During the colonial period, grand juries did refuse to indict stamp act rioters and others. Undeterred, the British governors ultimately secured the indictments by bringing the cases before grand juries in areas where British supporters prevailed. *See generally* Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701 (1972); Friedman, *supra* note 13.

This idealized concept of the grand jury was, however, the notion that was passed down through the years, and it was the one which the writers of the Constitution had in mind. Moreover, as described in text below, this concept has greatly affected the attitude of judges toward the grand jury.

16. The phrase "infamous crime," as used in the fifth amendment, means a felony. *See* 8 J. MOORE, FEDERAL PRACTICE ¶ 6.02, n.1, at 6-7 (2d ed. 1975).

The question raised, then, by this historical vision of the grand jury is how such an institution could be twisted into an instrument of repression.

As with many institutions, some of the strengths of the grand jury were also its most dangerous aspects. These aspects, coupled with two important developments, have enabled the grand jury to be misused and abused by prosecutors.

The grand jury's strength—its image as an independent protector of individual liberties—has led to a unique judicial attitude toward it. Unlike any other element of the legal system, and even unlike any legislative committee or administrative agency, the grand jury has been freed by the courts from virtually all requirements of procedural due process.[17]

As a result, a federal prosecutor can subpoena anyone to appear before a grand jury without telling the person what the subject of the investigation is or why he or she was called; the prosecutor can ask virtually unlimited questions of the witness, and the witness cannot generally challenge the relevancy of the questions. Probably no other government institution possesses such power.[18]

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17. *See, e.g.*, Blair v. United States, 250 U.S. 273 (1919).

"[The witness] is not entitled to urge objections of incompetency, irrelevancy, such as a party [in a judicial proceeding] might raise, for this is no concern of his.

. . . .

"He is not entitled to set limits to the investigation . . . . It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. . . .

"[W]itnesses are not entitled to take exception to the jurisdiction of the grand jury or the court over the particular subject-matter that is under investigation." *Id.* at 282 (citations omitted).

18. Two experienced grand jury practitioners have described the powers of the grand jury as follows: "Unlike a subpoena used in other proceedings, a grand jury subpoena does not disclose to the person receiving it the nature of the proceeding, nor does it disclose the questions which that person is to be asked.

"Rule Six of the Federal Rules of Criminal Procedure authorizes district court clerks to issue grand jury subpoenas to the U.S. attorneys in blank . . . . *No prosecutor need make a showing, at that time or at any other, that he has any reason to believe that the witness named on the subpoena has any information relevant to the investigation.*

"Federal grand juries enjoy nationwide service of process.

"Nor is there any statutory or judgemade minimum notice requirement.

"Once the witness is within the grand jury room, no effort is made to dispel the mystery. Present in the room are the members of the grand jury (up to 23) and one or more prosecuting attorneys. No judge is permitted to be present during questioning or

The ability of the grand jury to conduct unfettered secret investigations,[19] facilitated by the judicial attitude of noninterference, presented a tremendous potential for abuse. It took two modern developments, however, to make that potential reach fruition. The first was the evolution of the grand jury from a more or less independent institution to an institution completely dominated by the prosecutor.

This development was not derived from changes in rules or laws; rather, it was a natural evolution which paralleled the centralization of power in the executive branch of government. As the grand jury ceased to be a body of neighbors familiar with the area they were investigating and became instead an impersonal body investigating complicated federal crimes, the prosecutor gained increasing control, since he or she was privy to the facts, the investigative resources, and the knowledge of the laws. By 1931, the famous Wickersham Committee report stated:

> Every prosecutor knows, and every intelligent person who ever served on a grand jury knows, the prosecuting office almost invariably completely dominates the grand jury . . . . The grand jury usually degenerates into a rubber stamp wielded by the prosecuting officer according to the dictates of his own sense of propriety and justice.[20]

Since 1931, this tendency has increased. One study concluded that in less than 2 percent of the cases do grand juries disagree with prosecutors; and the study's author stated that conversations with prosecutors indicated that the specified percentage was probably high.[21] Even the Justice Department has publicly admitted that the independence of the grand jury is a myth. In a letter dated September 10, 1974, Assistant Attorney General W. Vincent Rakestraw wrote to Congressman Peter Rodino, Chairman of the House Judiciary Committee: "[I]n our judgment, the grand jury does not operate to protect the individual to any substantial degree . . . ."[22] Mr. Rakestraw continued, quoting approvingly from an article by Judge Campbell:

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during grand jury deliberations. Finally, the witness is not allowed to have a lawyer inside the grand jury room while the interrogation is taking place.

"The boundaries, then, are as wide as the United States itself—sometimes even wider." Winograd & Fassler, *The Political Question*, TRIAL, Jan./Feb. 1973, at 16, 17.

19. Grand jury proceedings are secret. The Federal Rules of Criminal Procedure provide that only the grand jurors, the witness, the reporter, and the prosecutor can be present. The witness cannot have an attorney present. *See* FED. R. CRIM. P. 6(d).

20. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 125 (1931), *quoting* ILLINOIS ASSOCIATION FOR CRIMINAL JUSTICE, ILLINOIS CRIMINAL SURVEY 229 (1929).

21. Friedman, *supra* note 13.

22. 120 CONG. REC. 11,355 (daily ed. Dec. 5, 1974) (letter from Assistant Attorney General W. Vincent Rakestraw to Rep. Peter Rodino, Sept. 10, 1974).

> It has also been suggested that the mere existence of the grand jury acts as a deterrent to the presentation of unfounded accusations by overzealous and malicious prosecutors. Of course, no empirical data is available to support this theory. Although difficult to refute for the same reason, in my judgment both logic and my experience mitigates its persuasiveness. In the first place, the theory, like all others in support of the grand jury, presumes the existence of a strong independent body intelligently and carefully analyzing the evidence presented to it. As we have seen, such independence has long since vanished under the strain of outside forces. Moreover, this myth of grand jury independence affords the prosecutor anonymity in the exercise of his discretion. I suggest that the consequence of such misplaced responsibility for the initiation of a prosecution encourages, rather than stifles, malintended prosecution and character assasination.[23]

In placing this letter into the Congressional record, Congressman Joshua Eilberg of the House Judiciary Committee noted that the letter showed that "the [Justice] Department recognizes that Federal grand juries no longer serve a protective function and it further concedes that this institution has become merely a convenient tool for Federal prosecutors."[24]

One obstacle to grave abuse of the grand jury system remained, however: the fifth amendment privilege against self-incrimination. Although grand juries, at the instance of prosecutors, could subpoena anybody and ask virtually anything, the witness, under the fifth amendment, had a constitutional right not to answer. The courts have held that the fifth amendment privilege against self-incrimination applies to grand jury proceedings,[25] thus enabling witnesses to block questioning by invoking the privilege.[26]

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23. *Id.* at 11,355-56, *quoting* Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L.C. & P.S. 179 (1973).

24. *Id.* at 11,354.

25. Blau v. United States, 340 U.S. 159 (1950); Counselman v. Hitchcock, 142 U.S. 547, 562 (1892).

26. Under the applicable cases concerning the scope of the fifth amendment privilege, the test of which questions may be incriminating is very broad. In the leading case, the Court stated that the privilege must be given "a liberal construction in favor of the right it was intended to secure." Hoffman v. United States, 341 U.S. 479, 486 (1951). The standard governing self-incriminatory statements was stated to be as follows:

"The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. . . . To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because

In 1968, however, the federal government, in order to limit the effect of the privilege, enacted a comprehensive immunity law.[27] Under this law, the prosecution, in its discretion, may grant immunity to witnesses. Actually, the word "grant" is misleading, since immunity may be imposed even if a witness prefers to stand on his or her fifth amendment privilege and not testify. Once immunity is given, the fifth amendment right no longer operates and the witness must either testify or be jailed for contempt.[28]

In 1970, the Nixon administration proposed, and Congress enacted, a new immunity law, which provides for what is termed "use" immunity.[29] Under this law, the witness is forced to testify; the only prohibition against the government is that it may not use the testimony or leads from it against the witness. If, however, the government has independent evidence against the witness, a prosecution is permitted. This provision was the first such federal law ever enacted in this country; it was upheld by the Supreme Court in 1972.[30]

At about this time the Justice Department, first under Attorney General Mitchell and then under Attorney General Kleindienst, conducted a major campaign to use the powers of the grand juries. The Justice Department's Internal Security Division, under the direction of Assistant Attorney General Robert Mardian, spearheaded the effort.[31]

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injurious disclosure could result. The trial judge in appriasing the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.' " *Id.* at 486-87.

The Court in *Hoffman* also pointed out that the witness is not required to explain just what in the answer would be incriminating:

"[I]f the witness, upon interposing his claim were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee." *Id.* at 486.

Following *Hoffman*, the Supreme Court and appellate courts reversed virtually all decisions in which lower courts had held that questions were not incriminating. *See* NATIONAL LAWYERS GUILD GRAND JURY DEFENSE OFFICE, REPRESENTATION OF WITNESS BEFORE FEDERAL GRAND JURIES § 13.4 (1974).

Given the broad test of what constitutes incriminating questions, when grand jury witnesses claimed the privilege, the prosecutors could almost never show that the questions would *not* be incrimination. Witnesses could by this tactic effectively block prosecutors' questioning.

27. Act of July 19, 1968, Pub. L. No. 90-351, § 802, 82 Stat. 216.

28. The contempt sentence is for the duration of the grand jury's term, which may be as long as 18 months. 28 U.S.C. § 1826 (1970).

29. 18 U.S.C. §§ 6002-03 (1970).

30. *See* Kastigar v. United States, 406 U.S. 441, 453 (1972). The case was decided by a five to two vote, with the three Nixon appointees voting in the majority. The fourth Nixon appointee, Justice Rehnquist, disqualified himself.

31. In a Justice Department internal realignment, the Internal Security Division

Mardian hired an attorney, Guy Goodwin, to head the division's Special Litigation Section, which was in charge of grand jury operations, and the grand jury campaign began in earnest.[32]

The campaign has consisted of grand jury investigations of politically dissident groups, usually those on the left, by United States attorneys, initially from the Justice Department's Internal Security Division. In a typical situation, the attorneys subpoena a number of people connected with a group, grant immunity to many of them, and then ask questions concerning their political associations, friends, families, and other details of their lives.[33] Two observers have stated that these prosecutors' main goals have been to gather intelligence on the political left and to harass political activists.[34] Although a specific criminal act has been the purported subject of each investigation, the questions have been far more wide-ranging. If a witness has refused to cooperate, he or she has been jailed for contempt.

The nature of these grand jury investigations is revealed by some examples of the questions asked.[35] During a 1971 federal grand jury investigation in Tucson, Arizona, the prosecutor said to a witness:

> I would like to ask at this time if you have ever been a member of any of the following organizations, and if so, to tell the grand jury during what period of time you belonged to any of these organizations, with whom you associated in connection with your membership in any of these organizations, what activities you engaged in and what meetings you attended, giving the grand jury the dates and the conversations which occurred: The Save Our Soldiers Committee, the Coalition, the Los Angeles Reserve

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was disbanded in 1973 and transferred to the Criminal Division, where it has remained largely intact as the Internal Security Section. National Lawyers Guild Grand Jury Defense Office, WITNESS, Apr. 6, 1973, at 159.

32. New York Times reporter Lacey Fosburgh interviewed Guy Goodwin and wrote an article about him. She noted Goodwin's reputation, even within the Justice Department, as an overzealous foe of the political left: "Even one of Nixon's own high-ranking appointees acknowledged in an interview that he was very disturbed by Goodwin's work. This official, speaking only with the assurance his name would not be used, said: 'These guys [referring to Goodwin's staff in general] live in a world of their own. They forget we're civilized people, and they don't understand the whole question of due process. They believe they're protecting America from bad people and that it's in the interest of the country to do what they're doing.'" Fosburgh, *Who Is Guy Goodwin and Why Are They Saying Those Terrible Things About Him?*, JURIS DOCTOR, Jan. 1973, at 14, 41.

33. *See* Donner & Cerrutti, *The Grand Jury Network*, 214 THE NATION 5 (1972). *See also* sources collected in note 49 *infra*.

34. Donner & Cerrutti, *The Grand Jury Network*, 214 THE NATION 5 (1972).

35. *See* Letter from National Lawyers Guild Grand Jury Defense Office to Senate Select Committee on Presidential Campaign Activities, June 6, 1973 (compilation of typical questions).

> Association, the Peace and Freedom Party, the Los Angeles Committee to Defend the Bill of Rights, the Humanistic and Educational Needs of the Academic Community Organization;—that is it for now.[36]

Before the same grand jury, the prosecutor asked another witness: "Describe every person who has visited your house subsequent to your last appearance [before the grand jury] (six months previously)—who they were, what conversations occurred, who was present, when they visited."[37]

At about the same time a witness before a federal grand jury in Seattle was asked about all conversations which had occurred during a fifty-six hour car trip across the country with friends. At another Seattle federal grand jury proceeding in May 1972, a witness was told:

> I want you to tell the grand jury over the last two years every telephone number which you have had at a place where you resided, or every telephone number at a place where you have had access to the use of that telephone.[38]

There have been more than 100 of these grand juries, with over 2,000 witnesses subpoenaed.[39] The objects of investigation have included antiwar and antidraft groups;[40] the Black Panther Party;[41] supporters of the Irish Republican Movement;[42] the Vietnam Veterans Against the War;[43] Father Berrigan and other antiwar Catholics;[44] and Daniel Ellsberg and others associated with the Pentagon Papers.[45] In addition, grand juries have subpoenaed news reporters in an attempt to acquire information received from confidential sources.[46]

There has been a strong outcry against this abuse of the grand jury. For example, Senator Kennedy states in hearings before the House Judiciary Subcommittee:

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36. *Id.* at 6.

37. *Id.*

38. *Id.* at 10.

39. Conyers, *Grand Juries: The American Inquisition*, RAMPARTS, Aug./Sept. 1975, at 15 [hereinafter cited as Conyers].

40. *See In re* Verplanck, 329 F. Supp. 433 (C.D. Cal. 1971).

41. *See* Branzburg v. Hayes, 408 U.S. 665 (1972); Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972); Levinson v. Attorney General, 321 F. Supp. 984 (E.D. Pa. 1970).

42. *See* Meisel v. United States, 412 U.S. 954 (1973); *In re* Tierney, 465 F.2d 806 (5th Cir. 1972).

43. *See* Beverly v. United States, 468 F.2d 732 (5th Cir. 1972).

44. *See* United States v. Berrigan, 482 F.2d 171 (3rd Cir. 1973).

45. *See* United States v. Doe, 451 F.2d 466 (1st Cir. 1971); *In re* Ellsberg, 446 F.2d 954 (1st Cir. 1971).

46. *See* Branzburg v. Hayes, 408 U.S. 665 (1972) (upholding power of grand jury to subpoena reporter and demand information about confidential sources). The Court held that the first amendment did not protect against such a subpoena. *Id.* at 682-83. *See also* Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972).

> The use of "political" grand juries by the present administration is unprecedented. In a sense, of course, the practice is a throwback to the worst excesses of the legislative investigating committees of the 1950's.
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> In this respect, the Internal Security Division of the Justice Department represents the second coming of Joe McCarthy and the House un-American Activities Committee.
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> But, the abuse of power of the Department's overzealous prosecutors do not even know the bounds of a Joe McCarthy, because their insidious contemporary activities are carried out in the dark and secret corners of the grand jury, free from public scrutiny.
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> . . . .
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> And so it goes, as the special litigation section of the Internal Security Division plies its trade, with its small army of grand inquisitors barnstorming back and forth across the country, hauling witnesses around behind them, armed with dragnets of subpoenas, immunity grants, contempt citations, and prison terms.
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> These tactics are sufficient to terrify even the bravest and most recalcitrant witness, whose only crime may be a deep reluctance to become a Government informer on his closest friends or relatives, or an equally deep belief that the nose of the U.S. Government has no business in the private life and views and political affiliations of its free citizens.[47]

Furthermore, Judge Shirley Hufstedler of the Court of Appeals for the Ninth Circuit stated for a unanimous panel of the court that "[i]t would be a cruel twist of history to allow the institution of the grand jury that was designed at least partially to protect political dissent to become an instrument of political suppression."[48] In addition, numerous articles have been written condemning this grand jury pattern.[49]

Congress has responded by introducing a number of bills to curb the powers of grand jury proceedings.[50] Hearings were scheduled in

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47. *Hearings on Grand Jury Venue before Subcomm. 1 of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 13, 17 (1973) (testimony of Senator Edward M. Kennedy).

48. Bursey v. United States, 466 F.2d 1059, 1089 (9th Cir. 1972).

49. *See*, e.g., Boudin, *The Federal Grand Jury*, 61 GEO. L.J. 1 (1972); Conyers, *supra* note 39, at 14; Cowan, *The New Grand Jury*, N.Y. Times, Apr. 29, 1973, § 6 (Magazine), at 19; Diamond, *Fishing in Ellsberg's Wake*, MORE, Jan. 1972, at 1; Donner & Cerrutti, *The Grand Jury Network*, 214 THE NATION 5 (1972); Donner & Lavine, *Kangaroo Grand Juries*, 217 THE NATION 519 (1973); Fosburgh, *Who is Guy Goodwin and Why Are They Saying Those Terrible Things About Him?*, JURIS DOCTOR, Jan. 1973, at 14; Goodell, *Where Did the Grand Jury Go?*, HARPERS, May 1973, at 14; Quat, *Perversion of the Grand Jury*, RIGHTS, May/June 1972, at 3; Rabinowitz, Reif & Litt, *Repression by Grand Jury*, GUILD PRACTITIONER, Spring 1971, at 44; Winograd & Fassler, *The Political Question*, TRIAL, Jan./Feb. 1973, at 16.

50. H.R. 6207, 94th Cong., 1st Sess. (1975); H.R. 6006, 94th Cong., 1st Sess. (1975); H.R. 1277, 94th Cong., 1st Sess. (1975); H.R. 2986, 94th Cong., 1st Sess.

late 1975 and early 1976 to discuss these measures.[51] A national Coalition To End Grand Jury Abuse has been formed in Washington; among the members are several civil liberties and church groups.[52]

Despite this outcry the powers of the grand juries and their availability for prosecutorial abuse remain. One Congressman, for example, charged recently that two current federal grand juries were being conducted for purposes of harassment.[53] The present administration shows no sign of retreating from the use of this tactic, or even admitting that it might endanger the civil liberties of our citizens. Rather, the pervasive justification is that when the administration thinks the national security is involved, it can undertake whatever actions it deems wise. Thus, in August 1975, the Director of the Federal Bureau of Investigation, Clarence M. Kelley, could calmly warn the American people that we "must be willing to surrender a small measure of our liberties to preserve the great bulk of them."[54] No doubt Mr. Kelley, like Messrs. Mitchell,

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(1975). These bills would generally limit the duration of contempt sentences to six months, restrict the use of immunity, and provide procedural protections for witnesses, such as allowing attorneys in the grand jury room.

51. The hearings will be conducted by Congressman Eilberg (D. Pa.), a member of the subcommittee of the House Judiciary Committee.

52. Coalition to End Grand Jury Abuse, 300 Atlantic Building, 930 F Street, N.W., Washington, D.C. 20004. Members of the coalition are: American Civil Liberties Union, National Conference of Black Lawyers, National Emergency Civil Liberties Committee, National Lawyers Guild, Unitarian Universalist Association, United Methodist Board of Church and Society, Department of Law, Justice and Community Relations, American Friends Service Committee, Jesuit Social Ministries Conference, Church of the Brethren, and United Methodist Board of Global Ministries (Women's Division, National Division).

53. Congressman John Conyers (D. Mich.) has charged that federal grand jury investigations in 1975 in New Haven, Connecticut, and Lexington, Kentucky, allegedly inquiring into the whereabouts of fugitives, were used for harassment: "The Government of course has a responsibility for apprehending law breakers, but it has no responsibility to use the grand jury as a dragnet to force citizens to talk to the FBI. Nor does it have the responsibility to harass women in the communities of New Haven and Lexington, as it seems to have done." Conyers, *supra* note 39, at 16.

In May 1975, syndicated columnist Nicholas Von Hoffman also charged that the government was using the grand juries in New Haven and Lexington to harass people and to do the FBI's work: "What the government is after is a rundown on the lives and private affairs of people in the women's movement, whether gay or straight.

. . . .

"The grand jury wasn't created to be an investigative tool. Its purpose is to protect citizens against malicious prosecution by the authorities, not to afford the FBI subpoena powers that Congress has conspicuously refused to grant it. This instance of the use of the grand jury as a chamber of interrogation is less justifiable than most, since all the defendants in the bank robbery were indicted years ago." Washington Post, Mar. 19, 1975, at B2, col. 3.

54. S.F. Chronicle, Aug. 14, 1975, at 1, col. 1.

Kleindienst, and Mardian before him, thinks that he is in the best position to pick and choose which of our liberties are dispensable.

Lawyers Under Attack

Only twenty years ago, during the anti-communist and anti-left hysteria that characterized the period of McCarthyism, this country witnessed large-scale attacks against many attorneys. The attacks came in several forms. First, lawyers who represented people charged as subversives were themselves attacked. On June 27, 1953, for instance Senator McCarthy discussed a probe against lawyers who defended those accused of being communists.[55] Some of the lawyers who represented defendants in the Smith Act trials were subjected to disbarment proceedings.[56] Intimidation was so successful that in 1953, Justice William O. Douglas pleaded that the bar should not be afraid to defend people charged as subversives. In a speech to the Edmonton, Canada, Bar in August 1953, he warned that those who defend persons accused of being subversive should "not themselves be considered subversive," and that "[w]hen the Bar runs to cover, a whole community may be cowed, and that has happened in some places in the States."[57]

In addition to the intimidation of attorneys concerning the defense of politically unpopular clients, there were direct attacks on lawyers for their personal political beliefs. Senator McCarthy met with leaders of the American Bar Association (ABA) in June 1953 to discuss with them the need to investigate lawyers with communist politics.[58] His discussion bore fruit some months later when, on August 25, 1953, the ABA announced that it was purging all members affiliated with the communist party. In the style of the time, the organization also announced that it had compiled a list of all attorneys who had asserted the fifth amendment privilege not to testify before congressional committees.[59] At the same time, many state bar associations began to impose loyalty questions on applicants to the bar and to question the applicants about their political affiliations.[60] A number of suits were brought when applicants were denied admission to the bar because of their

55. *See* N.Y. Times, June 27, 1953, at 16, col. 6.

56. *See, e.g., In re* Isserman, 345 U.S. 286 (1953), *vacated on rehearing*, 348 U.S. 1 (1954); Sacher v. Association of the Bar, 347 U.S. 388 (1954).

57. N.Y. Times, Aug. 16, 1953, § 1, at 15, col. 1.

58. *Id.*, June 25, 1953, at 19, col. 3.

59. *See id.*, Aug. 26, 1953, at 1, col. 1.

60. *See* Brown & Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. CHI. L. REV. 480 (1953).

political affiliations or beliefs, or because they refused to answer questions about their political orientations.[61]

During the height of these attacks, Attorney General Brownell, under his authority to list subversive organizations pursuant to an executive order issued by President Eisenhower,[62] instituted proceedings against the National Lawyers Guild.[63] On August 27, 1953, even before instituting formal proceedings or giving those involved notice, Brownell made a speech to the ABA attacking the group.[64] Despite his efforts, the Lawyers Guild was never listed as a subversive organization, and in 1958 proceedings were finally dropped.[65]

As the hysteria subsided in the late fifties, the Supreme Court began to restore some order to the scene with the decisions in the 1957 bar admission cases.[66] In opinions by Justice Black, the Court reversed the actions of bar associations which had denied admission to applicants because of their past political affiliations or because they had refused to answer questions concerning their political connections and beliefs. Although those decisions were undoubtedly received with some relief by numerous attorneys who had viewed the McCarthy period as one dangerous to civil liberties, at least one commentator expressed criticism of them. In an article in the American Bar Association Journal, William H. Rehnquist, then an Arizona attorney, wrote, "Communists, former Communists, and others of like political philosophy scored significant

61. *See, e.g., In re* Patterson, 353 U.S. 952 (1957); Konigsberg v. State Bar, 353 U.S. 252 (1957); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Application of Levy, 348 U.S. 978 (1955); Sheiner v. Florida, 82 So. 2d 657 (Fla. 1955); *In re* Anastaplo, 3 Ill. 2d 471, 121 N.E.2d 826 (1954), *cert. denied*, 349 U.S. 903 (1955).

62. *See* Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 124-30 (1951) (discussion of the listing procedures).

63. *See* Weinberg & Fassler, A Historical Sketch of the National Lawyers Guild in American Politics, 1936-1968, at 1. The National Lawyers Guild is an organization of several thousand attorneys which was formed during the New Deal by liberal lawyers who supported Roosevelt's programs and were disenchanted with the Bar Association's opposition to the New Deal and its refusal to allow black lawyers to be members. The first president of the Lawyers Guild was John P. Devaney, retiring Chief Justice of the Supreme Court of Minnesota; among its founders were Jerome Frank, Karl Llewellyn, and United States Senator Albert Wald. *Id.* at 1, 2. Procedural aspects of the attempt to list have come before the courts. *See* National Lawyers Guild v. Brownell, 225 F.2d 552 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 927 (1956).

64. *See* Petitioner's Brief for Certiorari, at 40-50, National Lawyers Guild v. Brownell, 351 U.S. 927 (1956).

65. National Lawyers Guild, Press Release, Sept. 12, 1958 (on file in Meiklejohn Civil Liberties Library, Berkeley, California).

66. Konigsberg v. State Bar, 353 U.S. 252 (1957); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

victories during the October 1956 term of the Supreme Court of the United States . . . ."[67]

Although we have not seen a recurrence of the pervasive climate of political intimidation of the McCarthy period, there have been examples of government attacks on legal workers and lawyers for their political views. For example, in *Lenske v. United States*,[68] the Ninth Circuit reversed Lenske's tax conviction because it found no basis for the unique accounting method on which the government had based its charge that Lenske had failed to pay amounts owed. Judge Madden, who wrote the court's opinion, added a separate opinion in which he noted that the IRS had a political file on the defendant. The file included an article which indicated that "he and another lawyer had called a meeting for the purpose of forming a local chapter of the Lawyers Guild . . . ."[69] Judge Madden continued:

> I regard what I have recited above [concerning the IRS having a file on Lenske's political beliefs and activities] as a scandal of the first magnitude in the administration of the tax laws of the United States. It discloses nothing less than a witch hunt, a crusade by the key agent of the United States in this prosecution, to rid our society of unorthodox thinkers and actors by using federal income tax laws and federal courts to put them in the penitentiary. No court should become an accessory to such a project.[70]

Despite Judge Madden's outrage, the IRS continued to gather political information. The Watergate investigations revealed that the IRS, at the instance of the Nixon White House, kept files on 10,000 political opponents and friends of the Nixon administration.[71]

67. Rehnquist, *The Bar Admission Cases: A Strange Judicial Aberration*, 44 A.B.A.J. 229 (1958).

68. 383 F.2d 20 (9th Cir. 1967).

69. *Id.* at 27.

70. *Id.* at 27-28.

71. N.Y. Times, May 8, 1974, at 1, col. 7; *id.* Apr. 9, 1974, at 1, col. 6. On October 3, 1975, the *San Francisco Examiner* printed a front page story headlined, *How IRS Fed Data To Others.* The article stated: "A Senate panel is exploring the extent to which personal information about the 80 million Americans who pay taxes to the Internal Revenue Service goes into a sort of 'lending library' for use by agencies such as the FBI and CIA and even the White House.

"Sen. Frank Church, D-Idaho, chairman of the Senate intelligence committee yesterday opened an investigation into the IRS with a blistering attack on past abuses of the tax collecting agency, which he said 'is one of the largest repositories of raw intelligence information in the United States.'

" 'One wonders,' said Church, 'how an agency designed to collect revenue got into the business of defining and investigating political protestors' and other groups.

"He said that before late 1973, names of 8,000 individuals and 3,000 organizations were put on IRS 'special watch' lists at someone's request for information or meticulous audit.

"Included were columnist Joseph Alsop; soul rock singer James Brown; New York

In addition, some recent attacks have been directed at attorneys who have asserted unpopular views about the right of attorneys to protect their clients' confidences. For instance, Professor Monroe Freedman suggested in a speech that a defense attorney in a criminal case should be able to put a client on the stand even if the attorney knows that the client is lying.[72] Professor Freedman's position was that the constitutional rights to a jury trial and to counsel include the right to a lawyer even when the defendant testifies falsely. Despite the fact that Freedman had not acted in any way, but had merely advocated his position in a public speech, Warren Burger, then a court of appeals judge, sought to have the bar association bring disciplinary proceedings against him.[73] Ultimately, no sanctions were imposed against Freedman.

Within the past year several disturbing events have indicated a stepping up of attacks on lawyers. For example, the United States Attorney in San Francisco sought to have two attorneys indicted for helping Timothy Leary escape from prison in 1970. The grand jury, after hearing Leary and other witnesses testify, found that there was insufficient credible evidence and refused to indict. The United States Attorney announced that despite the grand jury's determination, he was filing charges with the state bar association against the attorneys.[74] A more general attack on defense attorneys appears in a 1975 study in which the Justice Department sought to analyze some of the recent political cases it has brought,[75] including the Chicago 8, Pentagon Papers, and Wounded Knee trials. The study states that in some cases, "the purpose of defense counsel appears to be to make the case untriable, by orchestrating the activities of the defendants, spectators, and themselves to constitute a purposeful interference with the orderly process of the trial."[76] The document names a "recurring group of experienced personnel" who have represented defendants in politically controversial trials, explaining that the actions of these lawyers were partly responsible for the large number of acquittals in such trials.[77]

Mayor John Lindsay; and civil rights leaders Coretta King, Aaron Henry and Jesse Jackson. Also there were the Civil Liberties Union; the John Birch Society, the Ford Foundation and the NAACP." S.F. Examiner, Oct. 3, 1975, § 1, at 1, col. 4.

72. For a review of the content of this speech, see Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

73. N.Y. Times, Sept. 28, 1975, § 7, at 7, col. 3.

74. S.F. Chronicle, Sept. 11, 1975, at 4, col. 1.

75. *See* Department of Justice, Disruption in the Courtroom and the Publicly Controversial Defendant (Apr. 18, 1975).

76. *Id.* at 1.

77. *Id.* at 5.

The study is particularly dangerous because it attempts to place the blame on defense attorneys while ignoring the misconduct and disruptive activities of the prosecution and the trial judge. The Chicago 8 trial is offered as an example of defense misconduct even though the Seventh Circuit, in an extensive opinion, made it clear that the trial judge's actions accounted for most of the disruption.[78] Similarly, the study notes critically that "a substantial portion of the American people seem willing to believe that the government, at least since the birth of the 'credibility gap' in the 1960's, will itself engage in misconduct in order to insure that the misconduct of others will be punished"[79] and that "these [politically controversial trials] were lost because they were tried before juries at least partially composed of people willing to be convinced of government misconduct."[80] Given that two of the most important cases the government has brought—the Pentagon Papers case and the Wounded Knee trial—were dismissed by federal judges because of government misconduct,[81] and that two attorneys general and a host of others were convicted for their participation in the Watergate scandal and related affairs, the Justice Department's denunciation of defense attorneys in the 1975 study is particularly ominous.

A final example of the recent attacks on lawyers is evocative of the McCarthy years. In September 1975, Representative Larry McDonald[82] placed into the Congressional Record, under the title *The Center for Constitutional Rights: Activists in the Struggle Against Our Republic*, a list of lawyers allegedly helping the international communist cause. The list included former Attorney General Ramsey Clark.[83]

This history of antagonism toward attorneys in response to their political activities or advocacy of unpopular opinions should prompt courts to exercise extreme care to preserve the independence of the bar.

78. *See* United States v. Seale, 461 F.2d 345 (7th Cir. 1972).

79. Department of Justice, Disruption in the Courtroom and the Publicly Controversial Defendant 2 (Apr. 18, 1975).

80. *Id.* at 10.

81. The Pentagon Papers prosecution against Daniel Ellsberg and Anthony Russo was dismissed by U.S. District Court Judge Matthew Byrne, Jr. on May 12, 1973. Judge Byrne stated that "improper Government conduct, shielded so long from public view" had offended "a sense of justice" in the case. N.Y. Times, May 13, 1973, at 1, col. 1.

The Wounded Knee trial against American Indian Movement leaders Dennis Banks and Russell Means was dismissed by U.S. District Court Judge Fred J. Nichol on September 16, 1974. In the dismissal, Judge Nichol cited government misconduct, including deceit of the court by the prosecution, and stated that the FBI had "stooped to a new low" in the case. *Id.*, Sept. 17, 1974, at 1, col. 3.

82. McDonald is a Georgia Democrat and a member of the John Birch Society. *Id.*, Nov. 2, 1974, at 12, col. 2.

83. 121 CONG. REC. E4656 (daily ed. Sept. 10, 1975).

An independent bar is necessary to insure that lawyers may properly protect the rights and liberties of their clients under our adversary system.

At the heart of our adversary system is the attorney-client privilege. It is the privilege which gives the client complete confidence in the attorney, and which allows the attorney to function most fully as an advocate for his or her client. Thus, it is essential that the privilege be construed broadly.

The History and Purpose of the Privilege[84]

The attorney-client privilege has been an established part of the common law for 400 years.[85] The rationale underlying this privilege has been stated as follows:

> In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent.[86]

Other justifications have also been suggested. As one court recently noted, it is difficult to overemphasize the need for trust between client and attorney, which is the prerequisite for effective representation of the client.[87]

Moreover, the privilege is rooted in the ethical requirements of the fiduciary relationship between the attorney and the client. As Wigmore stated:

> The *sense of treachery* in disclosing . . . confidences is impalpable and somewhat speculative, but it is there nevertheless. . . . [I]t must be repugnant to any honorable man to feel that the confidences which his relation naturally invites are liable at the

84. As noted in the text, the attorney-client privilege has been part of the common law since the 1500's. See note 85 & accompanying text *infra*. Some states have embodied the privilege in statutes; others rely on common law. The federal circuits have split on the question whether they should look to the state law or to federal common law. *Compare* United States v. Jones, 517 F.2d 666 (5th Cir. 1975) *and* Colton v. United States, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963) (federal common law controls) *with* Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960) (state law controls). Rule 501 of the newly-enacted Federal Rules of Evidence provides that for privileges generally, federal common law controls unless the proceeding or civil action is one in which state law applies. *See* FED. R. EVID. 501; Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). In this article, the privilege is discussed in terms of the common law, primarily as developed by the federal courts.

85. C. MCCORMICK, EVIDENCE § 87, at 175-79 (2d ed. 1972); 8 J.H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 541-45 (J. McNaughton rev. 1961) [hereinafter cited as WIGMORE].

86. 8 WIGMORE, *supra* note 85, § 2291, at 545-54.

87. *In re* Callan, 66 N.J. 401, 331 A.2d 612 (Sup. Ct. 1975).

> opponent's behest to be laid open through his own testimony. He cannot but feel the disagreeable inconsistency of being at the same time the solicitor and the revealer of the secrets of the cause. This double-minded attitude would create an unhealthy moral state in the practitioner.[88]

This same theme is recognized by the American Bar Association Code of Professional Responsibility, which notes that both "the proper functioning of the legal system" and the attorney-client fiduciary relationship require that a lawyer preserve the confidences of his client.[89]

Finally, the privilege is a basic reflection of a moral choice made by society that a right of privacy should accompany some relationships. In this regard, Professor Louisell has stated:

> It is the historic judgment of the common law, as it apparently is of European law and is generally in western society, that whatever handicapping of the adjudicatory process is caused by recognition of the privileges, it is not too great a price to pay for secrecy in certain communicative relations—husband-wife, client-attorney, and penitent-clergyman.
>
> Therefore, to conceive of the privileges merely as exclusionary rules, is to start out on the wrong road and, except by happy accident, to reach the wrong destination. They are, or rather by the chance of litigation may become, exclusionary rules; but this is incidental and secondary. Primarily they are a right to be let alone, a right to unfettered freedom, in certain narrowly prescribed relationships, from the state's coercive or supervisory powers and from the nuisance of its eavesdropping.[90]

For all these reasons, the attorney-client privilege has become a fundamental part of our legal system. Courts and scholars have reached fairly close agreement on the general definition of the privilege. A classic formula is contained in Judge Wyzanski's opinion in *United States v. United Shoe Machinery Corp.*:[91]

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the

88. 8 WIGMORE, *supra* note 85, § 2291 (citations omitted).

89. ABA CODE OF PROFESSIONAL RESPONSIBILITY, ETHICAL CONSIDERATION (EC) 4-1.

90. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 110-11 (1956).

91. 89 F. Supp. 357 (D. Mass. 1950).

> purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[92]

This general definition and an understanding of the purposes underlying the privilege provided a framework for consideration of two issues which have been the subject of recent attention: (1) whether the identity and address of the client are privileged information; and (2) whether information concerning the fee arrangment with the client is protected.[93]

The Identity and Address of the Client

Despite the broad terms in which the attorney-client privilege has been defined,[94] a general exception to the privilege has emerged. As one court explained:

> The existence of the relation of attorney and client is not a privileged communication. The privilege pertains to the subject matter, and not to the fact of the employment as attorney, and since it presupposes the relationship of attorney and client, it does not attach to the creation of that relationship. So, ordinarily, the identity of the attorney's client, or the name of the real party in interest, and the terms of the employment will not be considered as privileged matter.[95]

The rationale underlying this exception has been only minimally articulated. One explanation is that the identity of the client and the

92. Id. at 358-59. Another classic definition, essentially the same is Wigmore's: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." 8 WIGMORE, *supra* note 85, § 2292, at 554-57.

Wigmore's definition has been cited in many cases. *See, e.g.*, United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961). A more recent and slightly more comprehensive definition was set forth in the proposed Federal Rules of Evidence. Proposed Rule 503 detailed what constituted a confidential communication, who could claim the privilege, and when the privilege did not apply. Proposed Rule 503 was never enacted; instead, Congress decided not to enact any specific rules of privilege and left the area to common law development. *See* FED. R. EVID. 501. *See generally* H.R. REP. No. 650, 93d Cong., 2d Sess. (1974); S. REP. No. 1277, 93d Cong., 2d Sess. (1974).

93. There are other aspects of attorney-client privilege which have come before the court recently, most notably the issues of communications between joint clients and legal lawyers and communications between clients or representatives of the clients and legal workers or other assistants of the attorney. *See, e.g.*, United States v. Seale, 461 F.2d 345 (7th Cir. 1972); United States v. Jacobs, 322 F. Supp. 1299 (C.D. Cal. 1971). *Cf. In re* Verplank, 329 F. Supp. 433 (C.D. Cal. 1971). The text of this article has singled out for discussion the two areas which seem to be raised most frequently and which appear to present the greatest potential threat to the privilege.

94. See note 91 & accompanying text *supra*.

95. Behrens v. Hironimus, 170 F.2d 627, 628 (4th Cir. 1948), *quoting* 70 CORPUS JURIS *Witnesses* § 502.

fact of the attorney-client relationship are not matters given in confidence.[96]

A second explanation given for the exception is the need to ensure that there actually is a client. As the court in an early case observed:

> The court has a right to know that the client whose secret is treasured is actual flesh and blood, and demand his identification, for the purpose, at least, of testing the statement which has been made by the attorney who places before him the shield of this privilege.[97]

The rationales for not protecting the client's identity make sense in the limited situation in which the information is needed in order to proceed against the attorney, and the client will not be harmed by the disclosure. For example, in *Mauch v. Commissioner of Internal Revenue*[98] an attorney charged with tax evasion was asked to explain the source of unreported money deposited in his bank account. The attorney refused, claiming that the money had come from clients. In this circumstance, it might be reasonable to force the attorney to reveal the names of the clients, as disclosure is necessary to establish whether there really was an attorney-client relationship.

Beyond this limited situation, however, the justifications for compelling disclosure of a client's identity are not persuasive, and their weakness has not escaped the attention of the courts. For example, the court in *Mauch* noted, "Their reasoning is rather too general and not impressive, based as it is on some idea that the privilege does not apply to the creation of the relation . . . ."[99] In addition, some courts, while recognizing the exception, have stated that it does not necessarily apply in all circumstances.[100]

Beginning in 1960, a line of federal cases has severely limited the identity exception to the privilege. The initial case was *Baird v. Koerner*.[101] Baird, an attorney, was contacted by another lawyer, who

96. Colton v. United States, 306 F.2d 633, 636-37 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963).

97. United States v. Lee, 107 F. 702, 704 (C.C.E.D.N.Y. 1901).

98. 113 F.2d 555 (3d Cir. 1940).

99. *Id.* at 556.

100. *See, e.g.*, Colton v. United States, 306 F.2d 633 (2d Cir. 1962). "The fact that an attorney-client relationship has arisen and the specific authorization for its creation are not, generally speaking, privileged subjects." National Union Fire Ins. Co. v. Aetna Cas. Co., 384 F.2d 316, 317 n.4 (D.C. Cir. 1967). "In the absence of unusual circumstances, the fact of a retainer, the identity of the client, the conditions of employment and the amount of the fee do not come within the privilege of the attorney-client relationship." *In re* Semel, 411 F.2d 195, 197 (3d Cir. 1969), *cert. denied*, 396 U.S. 905 (1969).

101. 279 F.2d 623 (9th Cir. 1960).

represented a group of taxpayer clients. The attorney told Baird that the clients had discovered unpaid taxes and wanted to send the tax amounts to the government anonymously in order to protect themselves in any future IRS investigations or actions. Accordingly, the attorney delivered to Baird approximately $12,000; Baird then sent the IRS a cashier's check for that amount, accompanied by a letter[102] requesting that the money be deposited in the IRS fund for unidentified collections. Not surprisingly, the IRS issued a summons to Baird demanding that he reveal the names of the taxpayers or, if he did not know their names, the name of the attorney who had contacted him. Baird refused to answer the questions, asserting the attorney-client privilege. The government successfully urged in the trial court that Baird be held in contempt, arguing that the identity exception to the privilege applied. The Ninth Circuit reversed, stating:

> Confidential communications between client and attorney were privileged under common law. . . . The doctrine is based on public policy. While it is the great purpose of law to ascertain the truth, there is the countervailing necessity of insuring the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice . . . . This assistance can be made safely and readily available only when the client is free from the consequences of apprehension of disclosure by reason of the subsequent statements of the skilled lawyer.
>
> The government recognizes this general rule, but urges that it does not apply to the *identity* of the client . . . .
>
> . . . .
>
> In the instant case, a disclosure of the persons employing the attorney-appellant would disclose the persons paying the tax . . . .
>
> . . . .
>
> . . . If the identification of the client conveys information which ordinarily would be conceded to be part of the usual privileged communication between attorney and client, then the privilege should extend to such identification in the absence of other factors.[103]

Five years later, the Fourth and Seventh Circuits followed the opinion in *Baird*.[104] The Second and Tenth Circuits have similarly

102. The letter was reprinted in full in the court's opinion. *Id.* at 626.

103. *Id.* at 629-30, 632. The "other factors" referred to in the court's holding were stated to be: "(a) the commencing of litigation on behalf of the client where he voluntarily subjects himself to the jurisdiction of the court; (b) an identification relating to an employment by some third person, not the client nor his agent; (c) an employment of an attorney with respect to *future* criminal or fraudulent transactions; (d) the attorney himself being a defendant in a criminal matter." *Id.* at 632.

104. Tillotson v. Boughner, 350 F.2d 663, 666 (7th Cir. 1965); NLRB v. Harvey, 349 F.2d 900, 906 (4th Cir. 1965).

recognized the *Baird* line of cases as creating a limitation on the identity exception to the privilege.[105]

Recently, the Fifth Circuit in *United States v. Jones*[106] explicitly followed *Baird*. In *Jones*, five lawyers in Texas were subpoenaed before a federal grand jury and asked questions concerning the source of fees paid to them on behalf of a client and bond money for the client. The attorneys were held in contempt for refusing to answer, but the Fifth Circuit reversed. The court noted that *Baird* and its progeny stood for the proposition that any questions concerning the identity of a client or the nature of the attorney-client relationship would be privileged if the answers could be used against the client.[107]

In addition to these cases recognizing the privilege as applied to the identity of the client, a recent case has held that the address of the client is also privileged. *In re Grand Jury Subpoena of Stolar*[108] concerned an attorney who was subpoenaed before a federal grand jury after refusing to reveal the address of a client the FBI was trying to interview. The district court quashed the subpoena, stating:

> Sheperd [the client] was aware that he was being sought for questioning by the FBI—although apparently not in connection with any claimed crime on his part. He was not disposed to reveal his whereabouts to that agency. When Sheperd telephoned Stolar [the attorney] he made known his misgivings and sought counsel with respect to his legal rights. Stolar agreed to provide such legal advice. During the course of that conversation Sheperd gave the attorney his telephone number. As part of the attorney-client discussions which thereafter took place Sheperd also disclosed his home address and the name of the place where he was employed. The Court is of the opinion that the information sought was communicated to the attorney confidentially and solely for the purpose of receiving legal advice. Under the circumstances Sheperd had a legitimate basis to expect that such information disclosed to his attorney was made in confidence and would not be revealed. Legal advice that an individual may decline to be interviewed by the FBI will hardly be meaningful if the attorney at the behest of the FBI may then be compelled to disclose the very information which the client has legally sought to

105. "This is not a case like Tillotson v. Boughner . . . where response to the summons would have revealed the identity of an unknown client." United States v. Hodgson, 492 F.2d 1175, 1177 (10th Cir. 1974). "To be sure, there may be circumstances under which the identification of a client may amount to the prejudicial disclosure of a confidential communication, as where the substance of a disclosure has already been revealed but not its source." Colton v. United States, 306 F.2d 633, 637 (2d Cir. 1965). The Third Circuit and D.C. Circuit have also stated the identity exception in somewhat limited terms. See note 100, *supra*.

106. 517 F.2d 666 (5th Cir. 1975).

107. *Id.* at 672.

108. 397 F. Supp. 520 (S.D.N.Y. 1975).

> conceal. If it be urged that including such information under the umbrella of the attorney-client privilege may unduly hamper a lawful investigation, the answer is that other methods of obtaining the information sought must be found short of converting an attorney into an unwilling informant.[109]

The reasoning in this decision is sound. Although only one early case specifically extended the identity exception to the privilege to include the address of the client,[110] it follows from the *Baird* line of cases that such information would be privileged if disclosure could harm the client.

In sum, a number of circuits now recognize that the identity exception to the privilege is limited to those situations in which revelation of the client's identity would not help the government incriminate the client. This interpretation seems consistent with the purposes behind the privilege.[111] The courts should thus be firm in guarding against misuse of the grand jury designed to eviscerate the attorney-client privilege.[112] In this regard, federal prosecutors should be prohibited from subpoenaing lawyers to appear before the grand jury simply to facilitate the government's investigation of a case.

Fee Arrangements

Along with the identity exception to the privilege, courts have held that information concerning the fee arrangement with an attorney is not privileged.[113] As with the identity exception, the exception for fee

109. *Id.* at 524.

110. *See* United States v. Lee, 107 F. 302 (C.C.E.D.N.Y. 1901).

111. See text accompanying notes 85-93 *supra.*

112. This article is concerned only with the attorney-client privilege challenge to such subpoenas. Challenges can also be based on: (1) the lawyer's assertion that the subpoena constitutes abuse of grand jury process (using the grand jury to do the work of the prosecutor or investigative agency) (*see, e.g.*, United States v. Doe, 455 F.2d 1270 (1st Cir. 1972); United States v. Fisher, 455 F.2d 1101 (2d Cir. 1972); Durbin v. United States, 221 F.2d 520 (D.C. Cir. 1954); *In re* Grand Jury Subpoena of Stolar, 397 F. Supp. 520 (S.D.N.Y. 1975); NATIONAL LAWYERS GUILD DEFENSE OFFICE, REPRESENTATION OF WITNESSES BEFORE FEDERAL GRAND JURIES §§ 9.1-9.7 (1974)); (2) the lawyer's assertion of the client's fifth amendment privilege against self-incrimination (*see, e.g.*, United States v. Judson, 322 F.2d 460 (9th Cir. 1963)); and (3) the lawyer's assertion of the client's sixth amendment right to counsel in a criminal case (*see, e.g., In re* Terkeltoub, 256 F. Supp. 683 (S.D.N.Y. 1966)).

113. *See, e.g.*, United States v. Hodgson, 492 F.2d 1175 (10th Cir. 1974); United States v. Ponder, 475 F.2d 37, 39 (5th Cir. 1973); *In re* Semel, 411 F.2d 195, 197 (3d Cir. 1969), *cert. denied*, 396 U.S. 905 (1969); United States v. Pape, 144 F.2d 778 (2d Cir. 1944), *cert. denied*, 323 U.S. 752 (1944); Mauch v. Commissioner of Internal Revenue, 113 F.2d 555 (3d Cir. 1940); United States v. Lee, 107 F. 702 (C.C.E.D.N.Y. 1901).

arrangements appears to be based on the notion that such matters are not part of the confidences between attorney and client, and that "[a]bsent confidentiality, the privilege does not apply."[114]

It should be noted that some courts which announce a "fee exception" to the privilege have expressed difficulty with the idea that fee arrangements are outside the area of communications between attorney and client. In one leading case, for example, the court stated: "The privilege is limited to confidential communications, and a retainer is not a confidential communication, although it cannot come into existence without some communication between the attorney and the—at that stage prospective—client."[115]

The same considerations which govern the identity exception[116] should control in considering fee arrangements; because of the similarity of reasoning no extensive discussion will be presented in this section. Like the issue of client identity to which it is closely related, the matter of fee arrangements should be privileged if disclosure of the information would operate to the prejudice of the client.[117] The Fifth Circuit and the Ninth Circuit have recently considered this issue, arriving at opposite conclusions.[118]

On October 17, 1974, an attorney in Nevada was subpoenaed by a federal grand jury and ordered by the district judge to answer questions concerning his representation of a client. The questions referred to fee arrangements with the client herself, fee arrangements with others on the client's behalf, and funds received for representation of the client.[119]

The attorney was held in contempt for refusing to answer the questions, and the Ninth Circuit upheld the district court's order, noting:

114. United States v. Hodgson, 492 F.2d 1175, 1177 (10th Cir. 1974).

115. United States v. Pape, 144 F.2d 778, 782 (2d Cir. 1944).

116. See notes 94-112 & accompanying text *supra*.

117. This section deals with the privilege as it protects information concerning fee arrangements. A related area not discussed in this article involves the attorney, at the client's direction, making a money arrangement, such as an arrangement to send a check to someone for the client. Several courts have held that when the attorney carries out such actions, the attorney is acting not in the capacity of legal advisor, but rather simply as ministerial messenger, and thus that the actions are not privileged. *See, e.g.*, United States v. Brickey, 426 F.2d 680 (8th Cir. 1970); United States v. Bartone, 400 F.2d 459 (6th Cir. 1968); McFee v. United States, 206 F.2d 872 (9th Cir. 1953). These decisions seem questionable, especially in light of the *Baird* line of cases. See notes 101-08 *supra*.

118. United States v. Jones, 517 F.2d 666 (5th Cir. 1975); *In re* Grand Jury Appearance of Michaelson, 511 F.2d 882 (9th Cir. 1975), *cert. denied*, 421 U.S. 970 (1975).

119. 511 F.2d at 885-86.

> There are strong policy reasons why the existence of an attorney-client relationship, including the fee arrangment, should not be privileged absent incriminating circumstances . . . . The courts have inherent power to regulate the bar. The courts have the right to inquire into fee arrangements both to protect the client from excessive fees and to assist an attorney in collection of his fee, but more importantly, the court may inquire into fee arrangements to protect against suspected conflicts of interest. When an attorney is paid by someone other than his client to represent that client there is a real and present danger that the attorney may in actuality be representing not the interest of his client, but those of his compensator. Not only does the client have a right to know who is paying his attorney, but the court retains the right to satisfy itself that no conflict exists and that the attorney is fulfilling his duty of loyalty to his client.[120]

In this case, however, the grand jury was not investigating excessive charges of fees by the attorney, nor was it considering his possible conflict of interest. Had either of these issues been present, it might have made sense to hold that the matters were not privileged, at least if the information was not also to be used against the client.[121] As pointed out by Judge Merrill in his dissent, the information sought was undoubtedly aimed at the client and could have been used against her:

> I can conceive of no purpose for seeking the information covered by the questions in issue except to show a connection between Miss Sibson and some unknown person thought to have referred her to Michaelson and to have undertaken to pay his fee. If such connection be relevant, one may expect that some inference of guilt of Miss Sibson may rationally be drawn from the fact of the connection. Asking these questions of Michaelson can serve alternative purposes: (1) if the answers correspond to those already given by Miss Sibson, the United States may have escaped Miss Sibson's use immunity by obtaining the information from another source; (2) if the answers differ from those given by Miss Sibson, they may serve to expose her to a charge of perjury. I dislike this reliance upon the attorney-client relationship to accomplish incrimination of the client.[122]

Despite the urging of a number of bar groups,[123] the Supreme Court denied certiorari in the case.[124]

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120. *Id.* at 888-89.

121. In that situation, since the client's identity is known, it would be possible to subpoena the client and obtain the information from the client who, since the inquiry is being directed at the attorney's overbearing or illegal actions concerning the client, would no doubt be willing to waive the privilege. Once the client waives the privilege, the attorney cannot raise it, for the privilege is the client's. 8 WIGMORE, *surpa* note 85, § 2321.

122. 511 F.2d at 893-94.

123. See note 8 & accompanying text *supra.*

124. 421 U.S. 970 (1975).

The Fifth Circuit approached a similar situation in *United States v. Jones*,[125] demonstrating considerably more solicitude for the privilege. The grand jury in *Jones* was investigating narcotics and income tax violations. The attorneys of a client charged with a narcotics violation were subpoenaed and asked who had paid the client's bail and arranged for his fee payments.[126] The district judge held the attorneys in contempt for refusing to answer. On appeal, the government argued that the fee arrangement exception should apply. The Fifth Circuit reversed, and in a strong opinion enumerated the policies behind the privilege and the basis for the court's holding that the fee exception did not apply:

> In this case the government sought to compel the relators to tell the grand jury the names of unidentified persons who had arranged for bonds and legal fees on behalf of known persons. . . . [T]he prosecutor had already represented to the district court that the government possessed "information" about certain individuals who had paid out money to attorneys in excess of reported income. In the totality of these circumstances, and in the words of *Baird*, "[t]he names of the clients are useful to the government for but one purpose." Disclosure by the relators of the unidentified "patrons'" names would be directly relevant to corroborating or supplementing already-existent incriminating information about certain persons suspected of income tax offenses, regardless of those persons' possible complicity in marijuana traffic. If relators were compelled to disclose the sought-after items before the grand jury, the unidentified clients—having been linked by their lawyers to payments in excess of reported income (the prosecutor need only produce their tax returns)—might very well be indicted. In any event, the income tax aspects of the government's inquiry demonstrate a strong independent motive for why the unidentified clients could be expected to (1) seek legal advice, and (2) reasonably anticipate that their names would be kept confidential.[127]

As in *Jones*, issues concerning the fee arrangements exception and questions about the identity exception frequently arise together; it should be recognized that a single approach is applicable to both. Courts

125. 517 F.2d 666 (5th Cir. 1975).

126. *Id.* at 669.

127. *Id.* at 674. The court in *Jones* distinguished *Michaelson* on the ground that in *Michaelson* the client had been given a form of immunity. *Id.* at 670 n.2. The fact that the client in *Michaelson* had been given immunity should make no difference, however, since, as Judge Merril noted in his dissent in that case, the information was still being used against the client. See note 122 & accompanying text *supra*. The test should be simply whether the government intends to gather information against the clients or their agents, or whether the government is truly conducting a limited investigation of unethical and illegal conduct by the attorney. For a discussion of the government's potential bad faith in claiming it is conducting the latter type of inquiry while really doing the former, see note 128 *infra*.

should be vigilant to guard the privilege when its purposes would be served. When the investigation is directed toward the acquisition of information to be used against a client, the privilege should be applied.[128] Failure of courts to allow protection in such circumstances will result in increasing instances of what Judge Merrill, dissenting in *Michaelson*, termed the "reliance upon the attorney-client relationship to accomplish incrimination of the client."[129]

Conclusion

Courts should view with alarm the abuse of grand juries by prosecutors and the attack on lawyers for their political views or for their zealous representation of clients. When faced with a situation in which an attorney is subpoenaed before a grand jury and asked to disclose information about a client, including the identity of the client and the nature of fee arrangements, a court should hold that any such information which the government might use against the client is privileged.

128. In *Jones* the court noted that the government prosecutors had been dishonest with the court in representing the motive for the investigation. 517 F.2d at 673. In a warning that all prosecutors should heed, the court noted that it would not let the government prosecutors get away with misrepresenting to or keeping secret from the court the true purpose of the grand jury inquiry. "[T]he government should not read this opinion as an invitation to tighten the web of secrecy surrounding its objectives and the nature and extent of information already in its hands when it calls lawyers to testify before prosecutorial bodies. The courts in this circuit will be ever vigilant to insure that they have adequate opportunities and sufficient helpful material in order to rule intelligently on these matters." *Id.* at 675.

129. 511 F.2d at 894.